

RITA L. WEBER)	
Claimant)	
VS.)	
)	
CHRISTOPHER MANOR)	Docket No. 219,365
Respondent)	
AND)	
)	
PHICO INSURANCE COMPANY)	
Insurance Carrier)	

This is a claim for a February 11, 1996 accident and alleged injuries to the neck and upper back. In the October 16, 2000 Award, Judge Clark adopted the opinions of the treating neurosurgeon, Dr. Paul Stein, and concluded that claimant's herniated cervical disc was the result of claimant's February 1996 work-related accident. Therefore, the Judge awarded claimant permanent partial general disability benefits based upon the stipulated seven percent whole body functional impairment rating.

Respondent and its insurance carrier contend Judge Clark erred. They argue claimant failed to prove that the herniated cervical disc was either caused or aggravated by the February 1996 work-related accident and, therefore, the claim for permanent partial general disability benefits should be denied. Conversely, claimant contends the Award should be affirmed.

The only issue before the Board on this appeal is whether claimant's herniated cervical disc and the resulting surgery are natural and direct consequences of the February 11, 1996 work-related accident.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant sustained personal injury by accident arising out of and in the course of employment with respondent on February 11, 1996. On that date, claimant was working for respondent as a certified nurse's aide (CNA) and was shoved and struck several times by a nursing home resident. During the incident, claimant struck her neck on a window ledge. Claimant described the incident as follows:

Q. (Mr. Pistotnik) What happened?

A. (Claimant) I took a resident into the bathroom to change him because he was wet. He was fine. When I took him in there, when I bent down to start redressing him, he became upset and started striking me.

Q. He was physically striking you with his fists?

A. Yes.

Q. Where did he hit you at?

A. He hit me in the chest. When I stood up, he shoved me up against the wall, which there is a window in the bathroom, and my head is right at the ledge, my neck. When I turned to walk out of the room, he struck me in my back.

Q. So your neck was struck by the ledge of the window?

A. Yes.¹

¹ Regular Hearing, January 10, 2000; p. 9.

Claimant immediately felt pain from her neck to the middle of her back and experienced difficulty breathing.

2. After the incident, claimant began treating with Dr. Jim Blunk, who prescribed medications, hot pack treatments, and physical therapy. The doctor placed claimant on light duty and restricted all lifting. Respondent accommodated those restrictions and claimant's symptoms improved. According to claimant, when Dr. Blunk released her in mid-April 1996, the doctor did not give her written restrictions but he did give her verbal restrictions. At the time of that release, claimant was having problems lifting and having problems turning her head as those movements aggravated her neck. Following the release, claimant's symptoms remained in check as long as she followed Dr. Blunk's recommendations. Claimant explained:

Q. (Mr. Pistotnik) When you talked about having pretty much a full recovery, did that mean you had a full recovery?

A. (Claimant) No, I still had the problem. It was bearable, and if I did the stretching like Dr. Blunk had told me to do, then it would go away, as long as I continued with the anti-inflammatories and muscle relaxers.²

By the summer of 1996, claimant's neck symptoms had improved to the point that she was experiencing symptoms only two or three times a month.

3. Claimant left respondent's employment in March 1996 because of babysitter problems and in May 1996 she began working for Oklahoma Investment Casting Company (OICC) cleaning excess wax off small parts while sitting in a chair. The only activity claimant found strenuous in that job was looking down to watch what she was doing. Claimant left that job after a short period of time because of two reasons. First, she believed her supervisor was discriminating against her because she was a woman. Second, her back was hurting. From June to October 1996, claimant worked for a nursing home in Blackwell, Oklahoma, in its Alzheimer's unit on the 11-to-7 shift. Claimant did not perform any strenuous activities in that job. After the Blackwell nursing home job, claimant returned to respondent's nursing home and found that the facility had been purchased by Beverly Health and Rehabilitation (Beverly Health).

4. Claimant then began working for Beverly Health as a CNA on October 14, 1996. Upon returning to the regular duties of a CNA, and working without restrictions, claimant began experiencing worsening symptoms within six days. Claimant believed that her increased symptoms were caused by the lifting that she was doing for Beverly Health as she had not lifted since leaving respondent's employment that previous March. Besides having increased upper back and increased neck symptoms, claimant also began

² Regular Hearing, January 10, 2000; p. 30.

experiencing headaches and symptoms in her shoulders and both arms, which she had not experienced following the February 1996 injury. Claimant described her neck symptoms as being worse than those she experienced immediately following the initial injury.

5. Claimant worked for Beverly Health for approximately two weeks as she was unable to continue working because of her increased symptoms. Except for working a partial day in November 1996, claimant then remained off work until August 5, 1997, when claimant's then-treating physician, Dr. Eyster, issued a statement indicating that there was nothing that could be done for claimant. Claimant then worked for a short period until November 19, 1997, when she was taken off work by Dr. Blunk for a shoulder injury, which is the subject of a workers compensation claim that she filed against Beverly Health for alleged injuries that she sustained beginning in October 1996. Although the record does not indicate when claimant next returned to work after November 19, 1997, claimant was again taken off work because of her neck injury on February 4, 1998. On April 9, 1998, Dr. Paul Stein operated on claimant's neck for a herniated disc. Dr. Stein released claimant on June 26, 1998, and claimant returned to work approximately one week later.

6. According to claimant, she has always believed her neck injury was caused by the February 1996 accident while working for respondent rather than any incident that occurred while working for Beverly Health.

7. Respondent and its insurance carrier presented the testimony of Dr. Jim Blunk, who is board certified in family practice and who is claimant's family doctor. Dr. Blunk saw claimant the day following the February 11, 1996 incident. At that time, claimant complained of her back hurting from the mid-thoracic area from about the fourth thoracic to the eighth thoracic vertebrae on the right. Claimant made no complaints regarding the cervical spine. Although the doctor's office notes did not mention complaints into the upper extremities, a document that claimant completed at that visit indicated that her back was on fire with pain, which was going into the shoulders. The doctor or his assistant saw claimant in follow-up on February 19, 28, March 5, 12 and 26, 1996. But the office notes from those visits do not mention that claimant was complaining of neck pain.

8. April 2, 1996, is the first date that Dr. Blunk's records indicate that claimant was having neck pain. That note states "pain in neck now from back[;] states[,] however[,] much better." At that visit, the doctor examined claimant's neck and found cervical spasm. At that time, the doctor thought claimant might have had cervical and thoracic myositis, which the doctor defined as muscle inflammation. The doctor next saw claimant on April 16, 1996, and noted that she was better. According to the doctor, there is no evidence in his records that would indicate that claimant had any cervical disc injury during the period that he treated claimant from February 12 through April 16, 1996. The doctor then released her from treatment. According to Dr. Blunk, claimant saw him in June 1996 and in August 1996 for unrelated problems. The records from both of those visits do not note neck complaints.

9. After claimant began experiencing increased symptoms while working for Beverly Health, she returned to Dr. Blunk for treatment. The doctor's notes indicate that on November 4, 1996, claimant complained of neck and back pain, numbness in her legs, and numbness in her arm that had started with lifting at work. Claimant related both her neck and back symptoms to lifting at work. The doctor again diagnosed cervical-thoracic myositis, and radiculopathy. After a short period of conservative treatment, Dr. Blunk recommended a neurosurgical consultation with Dr. Abay in Wichita to rule out a herniated disc. On December 2, 1996, the doctor's notes first record that claimant was having actual radicular symptoms.

10. Dr. Blunk's testimony regarding whether claimant's neck problems were caused by the February 1996 incident or caused by the work that she did for Beverly Health was inconsistent. The doctor initially testified that the radicular symptoms that claimant was having in November and December 1996 were a direct and natural result of the February 1996 injury. But near the end of his deposition, the doctor testified that he was not rendering an opinion as to which possible accident caused claimant's neck injury or the herniated disc. The doctor testified:

Q. (Mr. Pistotnik) Have you ever been asked to render an opinion as to which accident date is responsible for her [claimant's] neck injury or herniated disk?

A. (Dr. Blunk) No.

Q. Are you making any opinion with regard to either of those two things today?

A. No.³

11. Claimant presented the deposition of Dr. Paul Stein, who is a board certified neurosurgeon and who treated claimant from May 29, 1997, through August 1998. Because claimant was having numbness in the right hand along with other symptoms, Dr. Stein wanted an MRI scan of her neck. Claimant eventually had the MRI and it showed a herniated disc between the sixth and seventh vertebrae on the right side, which was pressuring the spinal cord and a nerve on the right. On April 9, 1998, Dr. Stein operated on claimant's neck, removed the disc between the sixth and seventh cervical vertebrae, and fused those vertebrae together.

12. Because claimant had filed two workers compensation claims – this claim against respondent and another against Beverly Health – the question of which employer should be responsible for the neck injury and the related medical treatment has been ongoing.

³ Deposition of Dr. Jim Blunk, April 6, 2000; p. 44.

On October 10, 1997, Dr. Stein had a telephone conversation with attorney Stephen Doherty, the attorney who represented Beverly Health and its insurance carrier in the workers compensation claim filed against them for the injuries allegedly sustained by claimant in October 1996. The subject of that conversation was whether claimant's symptoms and herniated disc were related to the February 1996 incident while claimant was working for respondent or whether they were related to the lifting that claimant did while working for Beverly Health. The doctor told Mr. Doherty that claimant's herniated disc and related symptoms were from the February 1996 accident. The doctor's October 10, 1997 office note reads:

I spoke to attorney Steven [sic] Doherty on the telephone. He wanted to know if the patient's symptomatology and disc herniation is related to her original injury of 2/11/96. She did not have any further injuries but continued to have more difficulty which was sometimes exacerbated depending upon activity. This is from my review of her records and report of May 29, 1997. I told him that I did feel that her injury of 2/11/96 was the source of her disc herniation and her current problems.

13. But at a December 2, 1997 preliminary hearing in which respondent and Beverly Health were arguing over which employer should be held responsible for claimant's medical treatment, respondent's attorney stated that he had spoken with Dr. Stein the day before and had provided the doctor with a copy of claimant's testimony, which contained a detailed history of claimant's symptoms.⁴ Dr. Stein's office notes confirm that conversation took place and also confirm that the doctor provided Mr. Mann with an opinion that was different from the opinion provided to Mr. Doherty. Dr. Stein told Mr. Mann that the February 1996 accident may have initially injured the ligaments and discs but that the herniated disc may have resulted from claimant's subsequent work. The doctor's December 1, 1997 notes read:

I spoke to Attorney Scott Mann's office on the telephone today. See the papers that he had sent for me to review. He wanted to know about whether the symptomatology was all related to the first injury or if there might have been aggravation from her subsequent work activities. The information that he provided was that the patient had stated that she did not have any significant symptomatology when she started her second job. She then started having trouble afterward. I think that it is reasonable to assume she might have injured the ligaments or discs with the initial physical injury and then subsequently the disc itself might have herniated with the aggravation from her subsequent work. At the time that I met with Attorney Doherty on 10/10/97, I did not have this additional information.

⁴ Preliminary Hearing, December 2, 1997; p. 7.

14. At his deposition, Dr. Stein attempted to clarify his opinion regarding the cause of claimant's herniated disc. In answering the hypothetical question asked by respondent's attorney, the doctor stated that the most logical explanation for claimant's injury is that claimant injured her neck in February 1996 and later aggravated the original injury. The doctor testified:

Yeah, and I don't have any absolute way of telling you, you know, what the situation is. It would seem to me that the most logical thing is that she injured herself in 1996, she had a problem. Whether the disc actually ruptured at that time or ruptured subsequently, I can't tell you. But that if she started having similar symptoms again, then maybe the activities that she was doing aggravated her original injury. But the original injury is still the original injury.⁵

The doctor also testified that he could not state within a reasonable degree of medical certainty that claimant would have needed the neck surgery solely due to the February 11, 1996 injury.

15. Dr. Philip Mills testified twice in this claim regarding the cause of claimant's herniated disc. The doctor first saw claimant on March 26, 1997, and took a history from claimant and reviewed her medical records, including those from Dr. Blunk. Based upon that evaluation, the doctor advised attorney Doherty in October 1997 that the herniated disc more likely than not had been present since the February 1996 accident. At his first deposition, which was taken in April 2000, Dr. Mills testified that he believed the February 1996 accident had caused both a tear in the cervical disc and fibromyalgia (which he defined as soft tissue pain) and that the disc tear became symptomatic again with the increased activity that claimant performed when she began working for Beverly Health. At the first deposition, Dr. Mills testified that the increased symptoms that claimant experienced while working for Beverly Health were only temporary.

But at Dr. Mills' second deposition, which was taken in June 2000, the doctor indicated that he was not certain of the opinions that he had previously given, assuming claimant associated the numbness in her arms and the onset of neck complaints with heavy lifting in October 1996 while working for Beverly Health. The doctor stated:

Well, I'd have to say -- it's a difficult question. And it is difficult to say within a -- given the contemporaneous record as I understood it, it's difficult -- it's more difficult within a reasonable degree of medical probability. No question about it, it is more difficult with Dr. Blunk's deposition than it is without it. I thinks it's going to take a -- obviously a judgment call on the part of the

⁵ Deposition of Dr. Paul Stein, January 26, 2000; pp. 15, 16.

Judge. I'm not able to be quite as confident. It certainly is possible all of it occurred 2-11-96, but it's also possible it did not. I don't know.⁶

Despite making the above statement, Dr. Mills concluded his testimony by stating that he stood by the opinions that he had provided in the first deposition, but he was less certain of their accuracy.

16. On November 15, 1999, claimant settled her workers compensation claim against Beverly Health. Although the settlement hearing transcript bears docket numbers 219,365 and 234,962, the only respondent shown in the caption is Beverly Health. At the settlement hearing, claimant's attorney indicated that the settlement did not include the claim for the February 11, 1996 accident. Claimant's attorney stated:

. . . Your Honor, I do have a couple of clarifications. This one docket number was actually filed against two separate and distinct employers. The February 11 of 1996 accident date was while the claimant was working for Christopher Manor and also involved a neck injury. We are not settling that date of accident with this hearing today. . . .⁷

CONCLUSIONS OF LAW

1. The October 16, 2000 Award should be modified to deny claimant's requests for permanent partial general disability benefits and future medical benefits.

2. The Board concludes that claimant has failed to prove that the herniated cervical disc or the April 1998 neck surgery was caused by, or was the direct result of, the February 1996 work-related accident. Those conclusions are based on the various medical opinions that were provided, coupled with claimant's history of symptoms and how those symptoms generally resolved until claimant began working for Beverly Health.

Because claimant began experiencing additional symptoms once she began working for Beverly Health, the Board concludes that it is more probably true than not true that claimant sustained a new and separate neck injury at Beverly Health. Therefore, the Board concludes that the April 1998 neck surgery was not the direct and natural consequence of the February 1996 incident.

3. Based upon the above, the Board concludes that claimant's benefits in this claim should be limited to the reasonable and necessary authorized medical treatment, and

⁶ Deposition of Dr. Philip Mills, June 7, 2000; pp. 14, 15.

⁷ Settlement Hearing, November 15, 1999; p. 3.

unauthorized medical treatment up to the statutory \$500 cap,⁸ which are related to the February 1996 accident as opposed to the injuries sustained at Beverly Health. The requests for permanent partial general disability benefits and future medical benefits are denied.

AWARD

WHEREFORE, the Board modifies the October 16, 2000 Award and denies the requests for permanent partial general disability benefits and future medical benefits. But the Board affirms the awards of reasonable and necessary authorized medical benefits, unauthorized medical benefits, four weeks of temporary total disability benefits, and the order assessing costs against respondent and its insurance carrier.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority and would affirm the Award. We believe the greater weight of the evidence proves claimant permanently injured her neck in the February 1996 accident and that such injury ultimately resulted in the April 1998 disc surgery.

Claimant testified she had ongoing neck symptoms following the February 1996 accident that she kept in check by limiting her activities. Claimant also testified she promptly began experiencing increased symptoms when she began working at Beverly Health and that she did not sustain an identifiable traumatic event at Beverly Health. Dr. Blunk testified that the radicular symptoms claimant was having in November 1996 were

⁸ See K.S.A. 44-510(c)(2) (Furse 1993).

a direct and natural result of the February 1996 injury, and that the symptoms that claimant was having in November 1996 were the same as those that she had in April 1996. Dr. Stein indicated that the February 1996 accident probably injured the ligaments or discs, which were then aggravated by the activities at Beverly Health. And Dr. Mills testified that the February 1996 accident probably tore the cervical disc and that the work at Beverly Health only temporarily aggravated claimant's symptoms. That evidence, coupled with the very short period that claimant worked at Beverly Health before she began having problems, leads us to conclude that it is more probably true than not true that claimant's neck injury is directly related to the February 1996 accident.

We believe Judge Clark carefully weighed the evidence and correctly concluded that claimant should receive benefits for a seven percent permanent partial general disability and future medical benefits.

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Scott J. Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director